Embassy of the United States of America

To Whom It May Concern:

This letter is provided in reference to July 9, 2012 instructions from the Indian Ministry of Home Affairs to the Indian Ministry of External Affairs in MEA ref. F.No.25022/74/2011-F.I. The referenced letter stipulates that "a letter from the Embassy of the foreign country in India or the Foreign Ministry of the foreign country should be enclosed with the Visa application stating clearly that (a) the country recognizes surrogacy and (b) the child/children to be born to the commissioning couple through the Indian surrogate mother will be permitted entry into their country as a biological child/children of the couple commissioning surrogacy."

In the United States, there is no national law regulating surrogacy. Each state in the United States is free to formulate its own laws regulating assisted reproductive technology (ART) and other issues related to family law. There is no federal law that prohibits the recognition of children born abroad through surrogacy. Under current U.S. law, a child born abroad through surrogacy may have a claim to U.S. citizenship if the child is biologically related to a U.S. citizen.

The determination of citizenship for children born abroad to U.S. citizen parent(s) is governed by the U.S. Immigration and Nationality Act (INA) sections 301 and/or 309, and the adjudication of a child's claim to U.S. citizenship will be undertaken in accordance with these and all other U.S. laws. Procedures for determination of citizenship are outlined in the attached printout from our website.

Factors that determine whether a child born abroad through surrogacy will acquire U.S. citizenship include the date that the biological U.S. citizen parent acquired citizenship, the ability of the biological U.S. citizen parent to demonstrate that s/he has acquired sufficient physical presence in the United States, and evidence of the biological connection to the child. The Department determines the citizenship of each child individually, on a case by case basis, after carefully considering the specific facts surrounding the child's birth and his or her parents' situation.

Children born abroad who do not acquire US citizenship automatically at birth may still be eligible to apply for a visa and entry into the United States depending on the particulars of their parents' circumstances.

We ask that you afford these U.S. citizen visa applicants every consideration in their application for medical visas to pursue the possibility of surrogacy in India.

EMBASSY OF THE UNITED STATES OF AMERICA
NEW DELHI

Important Information for U.S. Citizens Considering the Use of Assisted Reproductive Technology (ART) Abroad

- Transmission of U.S. citizenship at birth to a child born abroad is governed by Immigration and Nationality Act (INA) Sections 301 and/or 309. The Department of State interprets the INA to require a U.S. citizen parent to have a biological connection to a child in order to transmit U.S. citizenship to the child at birth. In other words, the U.S. citizen parent must be the sperm or the egg donor in order to transmit U.S. citizenship to a child conceived through ART.

- The determination of citizenship of children born abroad to a U.S. citizen parent is the responsibility of the U.S. Department of State and is governed by U.S. law. Therefore, even if local law recognizes a surrogacy agreement and finds that U.S. parents are the legal parents of a child conceived through ART, if the U.S. citizen parents do not have a biological connection to the child, the child will not be a U.S. citizen at birth.

- The Department determines the citizenship of each child that applies for documentation as a U.S. citizen individually, on a case by case basis, after carefully considering the specific facts surrounding the child's birth and his or her parents' situation. We cannot "pre-adjudicate" a citizenship determination. In many cases involving ART, the best evidence available to parents to show their biological connection to a child born to a foreign surrogate, is DNA testing. These tests cannot be done until after the child is born.

- Children born abroad to foreign surrogates and who are not biologically related to a U.S. citizen parent can have trouble returning to the United States. If the child is not biologically related to a U.S. citizen parent, the child will not acquire U.S. citizenship automatically at birth. However, in some countries, the child will not acquire the citizenship of the country where he or she is born because the surrogate mother is not considered the parent of the child. In such a case, it may be impossible for that child to get a passport. It may be helpful for U.S. parents considering a foreign surrogacy arrangement to consult with an immigration attorney first.

- The Department is aware of cases of foreign fertility clinics that have substituted alternate donor sperm and eggs when the U.S. parents' genetic material turned out not to be viable. The undisclosed switch was revealed when the Post requested DNA tests as part of the process of documenting the child's citizenship for the purposes of issuing a passport. Such situations can have the unfortunate consequence of leaving children stateless.

- A U.S. citizen parent who has a child using a foreign surrogate mother may apply for a Consular Report of Birth Abroad of an American Citizen (CRBA) and a U.S. passport for the

child at the U.S. Embassy or Consulate in the country where the child was born.

- A CRBA certifies that a child born abroad is a U.S. citizen. A CRBA does not determine who the child's legal parents are. Therefore, in general, the name/s listed on the CRBA is the U.S. citizen parent/s with a biological connection to the child. A second parent may be listed on the CRBA if the second parent has a legal parental relationship to the child under local law.

- The U.S. passport also documents the citizenship status of the bearer and by law is proof of U.S. citizenship. If the Embassy or Consulate determines that the child is a U.S. citizen, he or she will need a U.S. passport to enter the United States. As part of the application process, the parents must provide evidence to the local U.S. Embassy or Consulate of the child's identity, birth, and citizenship. In an Assisted Reproductive Technology (ART) case, the parents would be required to provide medical and documentary evidence of the child's conception and birth, and evidence of the parents' identity, citizenship, and requisite physical presence in the United States. They might need to arrange for DNA tests of the child. If the child is biologically related to the US citizen father, but not the father's wife, the case would be treated as a birth out of wedlock to a U.S. citizen father, pursuant to INA 309(a), and the father would have to meet the additional requirements of that section otherwise INA 301 requirements would apply, including certain residence requirements.

- The requirements for passports for minors under 16 are governed by 22 Code of Federal Regulations (CFR) Section 51.28. Essentially, the legal parents of the child must both consent to the passport application unless one of the exceptions enumerated under 22 CFR 51.28 exist. If, under local law, a surrogate mother is the legal mother of a child born through ART, then the surrogate mother would need to consent to passport issuance for the minor child or one of the exceptions to the two-parent consent rule in 22 CFR 51.28 would have to be met.